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A Hidden Crisis

The Need to Strengthen Representation of Parents in Child Protective Proceedings

By Vivek S. Sankaran



“When I arrived at court that morning, I was told this is my lawyer. My lawyer sat down with me five minutes, asked me a couple of things, and told me to admit my drug addiction. I didn’t know anything about a fact-finding hearing. I wasn’t told what my rights were. I wasn’t told the procedure of court. I didn’t have any idea what was happening, and I was very much afraid, because the most important thing in my life had just been lost.”¹

Each year in Michigan, approximately 8,000 children are removed from their parents’ custody and placed in foster care. Statistics reveal that at least 50 percent of children enter foster care because of poverty-related neglect, as opposed to serious sexual or physical abuse, yet the Michigan foster care system has a disturbingly low success rate for returning children to their families. In 2008, only 34 percent of foster children whose cases had been closed were reunited with their parents.² Rather than excelling at expeditiously returning children to their families, the state has the seventh highest rate of terminating parental rights in the country and the second largest number of “legal orphans”—children who are permanent wards of the state after the rights of both of their legal parents have been terminated.³ Outcomes for these children are troubling and constitute one of a number of reasons why the state’s child welfare system recently failed every measure of a federal audit and is currently under federal court oversight after being sued by Children’s Rights, Inc., a national child advocacy

FAST FACTS:

Despite guaranteeing indigent parents the right to counsel in child protective proceedings, the state of Michigan places the burden of funding representation of parents on counties, which has led to wide variation in the compensation and training of parents' attorneys across the state.

In 2005, the Muskie School of Public Service concluded with respect to representation of parents in Michigan that "[w]hat was reported to evaluators...and what was observed in court hearings fall disturbingly short of standards of practice."

Recently, Justice Maura Corrigan of the Michigan Supreme Court observed a "disturbing and recent pattern of trial courts' failures to appoint counsel and untimely appointment of counsel to represent parents in child protective proceedings."

organization.⁴ Not surprisingly, parents are often scared and confused about the prospects of permanently losing their children to this faceless bureaucracy. Trusted and competent advocates are crucial in helping them through this difficult process.

A national consensus is emerging that zealous legal representation of parents is crucial in ensuring that the child welfare system produces just outcomes for children. National groups, including the Pew Commission on Children in Foster Care, the American Bar Association Center on Children and the Law, and the National Association of Counsel for Children, have been outspoken on the need to strengthen legal advocacy on behalf of parents, and a number of states—including Colorado,⁵ Connecticut,⁶ and Washington⁷—have initiated efforts to comprehensively reform their systems of appointing lawyers for indigent parents to better serve families. A national movement is afoot to ensure that all parents, regardless of income, receive assistance from effective, adequately compensated attorneys in all cases.

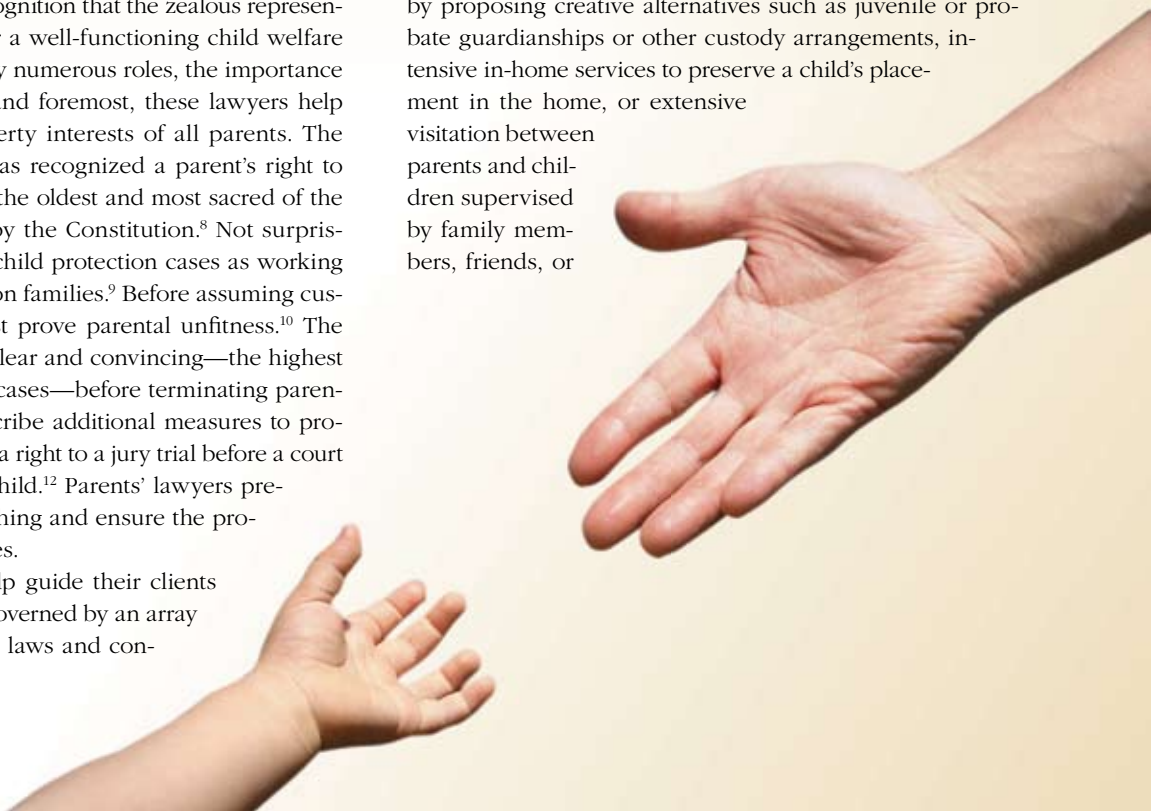
Why Representation of Parents Matters

The recent national focus on the legal representation of indigent parents is rooted in the recognition that the zealous representation of parents is essential for a well-functioning child welfare system. Lawyers for parents play numerous roles, the importance of which is well settled. First and foremost, these lawyers help safeguard the fundamental liberty interests of all parents. The United States Supreme Court has recognized a parent's right to raise his or her child as one of the oldest and most sacred of the fundamental rights protected by the Constitution.⁸ Not surprisingly, the Court has described child protection cases as working a "unique kind of deprivation" on families.⁹ Before assuming custody of children, the state must prove parental unfitness.¹⁰ The evidence of unfitness must be clear and convincing—the highest standard of proof used in civil cases—before terminating parental rights.¹¹ Michigan laws prescribe additional measures to protect these basic rights, including a right to a jury trial before a court can obtain jurisdiction over a child.¹² Parents' lawyers prevent the government's overreaching and ensure the protection of our basic civil liberties.

Counsel for parents also help guide their clients through complex proceedings governed by an array of interrelated federal and state laws and con-

trolled by a number of sophisticated professionals, including prosecutors, social workers, lawyer-guardians *ad litem*, court-appointed special advocates, therapists, and judges. Although the goal in the vast majority of cases is reunification, parents frequently disengage from the process because they are overwhelmed, confused, and frightened. The trusted advice of an advocate not only reassures the parent that he or she is not alone in navigating the child welfare labyrinth but helps the parent reach decisions consistent with legal and ethical mandates. These and other responsibilities of parents' counsel help empower parents in a system that often feels isolating.

In addition to safeguarding rights and empowering parents, parents' attorneys also improve the quality of decision-making. In an adversarial decision-making system, judges rely on the parties to uncover and present the key facts and arguments in the case. This can only occur if all parties are adequately represented. By challenging unreliable information and producing independent evidence of their clients' strengths and supports, parents' attorneys ensure that courts rely only on the most accurate information available before rendering life-altering decisions. Additionally, parents' lawyers can expand the options available to the courts by proposing creative alternatives such as juvenile or probate guardianships or other custody arrangements, intensive in-home services to preserve a child's placement in the home, or extensive visitation between parents and children supervised by family members, friends, or



neighbors. Without zealous representation of parents, courts lack an important perspective—that of the parent with whom reunification is sought—which increases the likelihood that an erroneous decision will be reached.

Not surprisingly, the limited data available soundly suggests that strong representation of parents dramatically improves the outcomes for children. In 2000, the Washington State Office of the Public Defender, funded by the state legislature, created a parents' representation pilot project that enhanced legal representation to parents by lowering caseloads, increasing compensation, and providing support services such as experts to the lawyers. After three years, the results of the pilot project were evaluated. Evaluators found that hearings took place more quickly, the rate of reunification increased by more than 50 percent, the rate of terminations of parental rights decreased by nearly 45 percent, and the rate of children leaving the foster care system without a permanent home declined by 50 percent.¹³ The results not only reaffirmed that strong representation of parents improves outcomes for children, but also demonstrated that "the enhancement of parents' representation has the potential to save increasing millions in state funding on an annualized basis."¹⁴

Results from the Center for Family Representation,¹⁵ an interdisciplinary law office in New York City providing high-quality representation for parents, demonstrate similar findings. While the median length of stay for children in foster care in New York City was 11.5 months in 2007, the length of stay for children whose parents were represented by the center was 3 months. Calculations done by the center demonstrated that the city saved more than \$2 million because of the reduced time these children spent in foster care. Although more studies are needed to explore how representation of parents improves outcomes for children, the initial results provide strong evidence demonstrating such a relationship.

Crisis in Michigan

In Michigan, the legislature and courts have consistently recognized the important role that parents' counsel play. The juvenile code and the court rules explicitly provide indigent parents the right to court-appointed counsel at every hearing,¹⁶ and a number of appellate decisions, as well as a plurality of the Michigan Supreme Court, have concluded that the right is constitutionally based.¹⁷ As aptly stated by Justice Levin in *Reist v Bay Co Circuit Judge*, "The best interests of the child will often be served by preservation of the parent[-]child bond; the child as well as the parent has an interest in preservation of their relationship. Counsel for the parent is the one advocate who can be depended on to defend that relationship."¹⁸

Yet despite this strong legal foundation for a parent's right to counsel, the promise of the right remains unfulfilled and too often parents receive ineffective representation. In 2005, the Muskie School of Public Service and the American Bar Association concluded with respect to representation of parents in Michigan that "[w]hat was reported to evaluators...and what was observed at court hearings falls disturbingly short of standards of practice."¹⁹

More recently, Justice Corrigan observed in her concurring statement in *In re Hudson*, "[A] disturbing and recent pattern of trial courts' failures to appoint counsel and untimely appointment of counsel to represent parents in child protective proceedings."²⁰ These observations accord with anecdotal evidence documenting wide variation across the state in systemic factors that affect the quality of parent representation, including compensation rates, training requirements, and timeliness of appointments.

These and other concerns prompted the Michigan State Court Administrative Office to commission a comprehensive assessment of the state's system of parent representation by the American Bar Association Center on Children and the Law.²¹ A final report issued in September 2009 confirmed many of the troubling findings previously noted. Among other things, the report noted that the state placed the entire burden of funding parent representation on counties, which created a wide disparity in compensation for attorneys across the state. For example, in Monroe County, attorneys make approximately \$50 an hour in cases, whereas in Genesee County, attorneys make as little as \$50 a hearing.²² The report also noted that "with a few exceptions, attorneys representing parents are not compensated for 'out of court work,' which greatly discourages the performance of crucial out-of-court advocacy."²³

The report also documented the effects these systemic deficiencies were having on actual practice. It observed that "hallway exchanges of information are accepted as a substitute for private office interviews, overlooking the inherent value of office consultation."²⁴ It found that courts frequently gave parents substitute counsel who had little knowledge of the case and no relationship with the parents. It also noted that parents' attorneys did not advocate for clients outside the courts during the months or weeks between court hearings. The report concluded that Michigan needed to comprehensively reform its system of representation of parents to include, among other things, a statewide administrative structure with uniform compensation standards, improved mandatory training for attorneys, and the early appointment of parents' counsel in all cases.

Next Steps

The need for a comprehensive overhaul of our county-based system of representation of parents is clear. Effective representation of parents is crucial to the welfare of the children involved in the child welfare system, and much more work needs to be done to better our current system, which is severely underfunded and broken. Important systemic issues need to be addressed: How do we create a system in which a parent's ability to receive effective legal assistance does not depend on the county in which he or she resides? In what ways can we provide support to solo practitioners representing parents who have very limited access to resources? Would the creation of multidisciplinary, nonprofit organizations or public agencies specializing in parent representation—as other states have done—improve our current practices? And, as demonstrated in other states, would these types of

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reforms enable us to improve outcomes for children while saving millions of dollars?

Those invested in the future of our child welfare system ought to engage in serious conversations to develop solutions that will create a better system for our families. ■



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FOOTNOTES

1. Moynihan *et al.*, Foreword to the proceedings of the Fordham Interdisciplinary Conference Achieving Justice: Parents and the Child Welfare System, 70 Fordham L.R. 287, 330 (2001), quoting Panel: Parents Speak [Excerpts], on file with the Fordham Law Review and available at <<http://law2.fordham.edu/publications/articles/500flspub11515.pdf>>. All websites cited in this article were accessed September 13, 2010.
2. See Michigan Supreme Court State Court Administrative Office, Michigan Foster Care Review Board 2008 Annual Report, p. 7, available at <http://courts.michigan.gov/scao/resources/publications/reports/fcrb/fcrb_ar08.pdf>.
3. See Michigan Family Independence Agency, Total State Ward Population, Wards Goal Adoption, Annual Adoptions, available at <http://www.michigan.gov/documents/FIA-AdoptTotWardPop_13088_7.pdf>. As of September 2007, Michigan had created more than 6,000 legal orphans.
4. See ChildrensRights.org, Reform Campaigns: Class Actions: Michigan (Dwayne B v Granholm) <<http://www.childrensrights.org/reform-campaigns/legal-cases/michigan-dwayne-b-v-granholm/>>. The lawsuit was filed in August 2006 based on allegations that the state of Michigan was mistreating children in foster care. On October 7, 2008, a consent decree was reached, placing the Michigan child welfare system under the oversight of the federal court.
5. See Colorado Supreme Court, Court Improvement Committee: Respondent Parents' Counsel Task Force <http://www.courts.state.co.us/Courts/Supreme_Court/Committees/rptf.cfm>.
6. See Connecticut Commission on Child Protection <<http://www.ct.gov/ccpa/>>. Connecticut has created the new statewide office—the Commission on Child Protection—to coordinate the appointment of attorneys who represent parents and children.
7. See Washington State Office of Public Defense, Parents Representation Program <<http://www.opd.wa.gov/PRP-home.htm>>. The Washington State Office of Public Defense has been recognized as one of the best parent representation offices in the country.
8. See, e.g., *Troxel v Granville*, 530 US 57; 120 S.Ct. 2054; 147 L.Ed.2d 49 (2000).
9. *MLB v. S.J.*, 519 US 102; 117 S.Ct. 555; 136 L.Ed.2d 473 (1996).
10. *Stanley v. Illinois*, 405 US 645; 92 S.Ct. 1208; 31 L.Ed.2d 551 (1972).
11. *Santosky v. Kramer*, 455 US 745; 102 S.Ct. 1388; 71 L.Ed.2d 599 (1982).
12. MCL 712A.17.
13. See National Council of Juvenile and Family Court Judges, *Improving Parents' Representation in Dependency Cases: A Washington State Pilot Program Evaluation* (2003), available at <<http://www.opd.wa.gov/Reports/Dependency%20&%20Termination%20Reports/watabriefcolorfinal%5B1%5D.pdf>>.
14. Bridge & Moore, *Implementing equal justice for parents in Washington: A dual approach*, 53 Juv. & Fam. Ct. J. 31 (Fall 2002).
15. See Center for Family Representation, Inc. <<http://www.cfrny.org/>>.
16. MCL 712A.17c; MCR 3.915.
17. See, e.g., *In re Williams*, 286 Mich App 253; 779 NW2d 286 (2009); *In re Powers*, 244 Mich App 111; 624 NW2d 472 (2000); *In re Cobb*, 130 Mich App 598; 344 NW2d 12 (1983); *Reist v. Bay Co. Circuit Judge*, 396 Mich 326, 346; 241 NW2d 55 (1976) (opinion by Levin, J.).
18. *Reist*, 396 Mich at 345 (opinion by Levin, J.).
19. American Bar Association Center on Children and the Law, *Michigan Court Improvement Project Reassessment* (2005), p. 155, available at <<http://www.courts.michigan.gov/scao/resources/publications/reports/CIPReassessmentReport090605.pdf>>.
20. *In re Hudson*, 483 Mich 928, 938; 763 NW2d 618 (2009) (Corrigan, J., concurring).
21. American Bar Association Center on Children and the Law, *Legal Representation for Parents in Child Welfare Proceedings: A performance-based analysis of Michigan practice* (2009), available at <http://www.abanet.org/child/parentrepresentation/michigan_parent_representation_report.pdf>.
22. See *id.* at 92–95.
23. *Id.* at 7.
24. *Id.* at 4.